(1)

00 1484 MAR 23 2001

No. ——

OFFICE OF THE CLERK

In the Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,
Petitioner,

v.

LEONARD APPLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JILL E. JACHERA
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6608

Counsel for Petitioner

PETER BUSCEMI
Counsel of Record
A. C. BROOKE CLAGETT
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

6 H Pl

QUESTION PRESENTED

The Consumer Leasing Act, 15 U.S.C. §1667a, requires that the amount or method of determining any early-termination charges in an automobile lease be disclosed "in a clear and conspicuous manner . . . ."

The question presented is whether the court of appeals erred in interpreting this statutory provision and accompanying regulations to require disclosure of a specific number used in calculating an early-termination charge, thus

(a) altering the Federal Reserve Board's focus on the "manner" and "form" of the required disclosures;

(b) imposing a substantive requirement not adopted by the agency charged with administering the statute; and

(c) bringing the Third Circuit into conflict with the Seventh Circuit, which has ruled in a similar case that "only the method, and not the way the method works, needs to be disclosed."

LIST OF INTERESTED PARTIES

Under this Court's Rule 29.6, petitioner Nissan Motor Acceptance Corporation ("NMAC") states: The parties to the proceeding below were NMAC, Reitenbaugh Enterprises, Inc., and Leonard Applebaum. NMAC is a subsidiary of N.N.A., Inc., ("NNA"), which is also known as Nissan North America, Inc. NNA is a subsidiary of Nissan Motor Company, Ltd., Japan. Renault S.A., of France, owns more than 10% of Nissan Motor Company, Ltd., Japan.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Factual Background	4
C. Statutory and Regulatory Background	5
D. Proceedings in the District Court	9
E. The Court of Appeals' Decision	11
REASONS FOR GRANTING THE PETITION	13
A. The Third Circuit's Interpretation of the "Clear and Conspicuous Manner" Standard of the CLA and Regulation M Conflicts Directly with the Seventh Circuit's Decision in *Channell*	15
B. The Court of Appeals' Decision in This Case Conflicts with this Court's Admonition in *Ford Motor Credit Co. v. Milhollin* Against Judicial Activism in the Face of Regulatory Silence	21
CONCLUSION	25
APPENDIX A	1a
APPENDIX B	18a
APPENDIX C	32a

TABLE OF AUTHORITIES

CASES — Page

Backensto v. NMAC, No. 00CV-6203 (SMO) (D.N.J. filed Dec. 21, 2000) 14
Carmichael v. NMAC, No. 1:00:CV-1254-TWT (N.D. Ga. filed May 19, 2000) 14
Cemail v. Viking Dodge, 982 F. Supp. 1296 (N.D. Ill. 1997) 20
Channell v. Citicorp National Services, Inc., 89 F.3d 379 (7th Cir. 1996) ..... *passim*
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 6, 11, 20-24
Gaydos v. Huntington National Bank, 941 F. Supp. 669 (N.D. Ohio 1996) 22
Jordan v. Toyota Credit Corporation, 236 F.3d 866 (7th Cir. 2001) 17
LaFramboise v. NMAC, No. 00-007609 (Fla. Cir. Ct. filed Oct. 17, 2000) 14
Lundquist v. Security Pacific Automotive Financial Services, 993 F.2d 11 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993) 7, 17
Manhattan Tankers, Inc. v. Dole, 787 F.2d 667 (D.C. Cir. 1986) 22
O'Melveny & Myers v. Federal Deposit Insurance Corp., 512 U.S. 79 (1994) 22
Ritter v. Durand Chevrolet, Inc., 945 F. Supp. 381 (D. Mass. 1996) 22
Smith v. Cash Store Management, Inc., 195 F.3d 325 (7th Cir. 1999) 20
Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982) 22
In re Thebeau, 3 B.R. 537 (E.D. Ark. 1980) 22
Turner v. General Motors Acceptance Corp., 180 F.3d 451 (2d Cir. 1999) 9

TABLE OF AUTHORITIES—Continued

STATUTES & REGULATIONS Page

Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f ..... *passim*
Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* 5-6, 8-9, 21
28 U.S.C. § 1254 2
28 U.S.C. § 1331 4
Regulation M, 12 C.F.R. Pt. 213 (1998) ..... *passim*
Regulation M, 12 C.F.R. Pt. 213 (1995) ..... *passim*
Regulation Z, 12 C.F.R. § 226.17(a)(1) 21
Regulation CC, 12 C.F.R. § 229.15(a) 21
Regulation DD, 12 C.F.R. § 230.3(a) 21
61 Fed. Reg. 52,246 (1996) 8, 22
62 Fed. Reg. 51,006 (1997) 8

MISCELLANEOUS

J. Henry, *Survey Finds Leasing Up Sharply in 1996*, Automotive News, June 23, 1997 6
S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431 20

In the Supreme Court of the United States

No. ___

NISSAN MOTOR ACCEPTANCE CORPORATION,
Petitioner,

v.

LEONARD APPLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Nissan Motor Acceptance Corporation ("NMAC"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 226 F.3d 214. The opinion of the district court (App. B) is not formally reported, but can be found at 1999 WL 236601.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. A petition for rehearing was denied on October 25, 2000 (App. C). On January 12, 2001, Justice Souter granted an application to extend the deadline for filing

this Petition to and including March 23, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Consumer Leasing Act ("CLA") states in relevant part:

> **§1667a. Consumer lease disclosures**
>
> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a *clear and conspicuous manner* the following information with respect to that lease, as applicable:
>
> * * * * *
>
> (11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a(11) (1994) (emphasis added).

The version of the Federal Reserve Board's Regulation M that was in effect at the time that the leases at issue were executed, provided in pertinent part:

> **§ 213.4 Disclosures**
>
> (a) *General requirements.* (1) Any lessor shall, in accordance with this regulation and to the extent applicable, make the disclosures required by paragraph (g) of this section with respect to any consumer lease. Such disclosures shall be made *clearly, conspicuously, in meaningful sequence*, and in accordance with the further requirements of this section. All numerical amounts and percentages shall be stated in figures and shall be printed in not less than the equivalent of 10-

> point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.
>
> * * * * *
>
> (g) *Specific disclosure requirements.* In any lease subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount *or method* of determining the amount of any penalty or other charge for early termination.

12 C.F.R. §213.4 (1995) (emphasis added).

The Federal Reserve Board's Official Staff Commentary on the meaning of the phrase "clearly, conspicuously and in meaningful sequence" stated as follows:

> *Clearly, conspicuously and in meaningful sequence.* This standard requires that disclosures be *in a reasonably understandable form.* For example, while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. . . . The requirement that disclosures be made clearly and conspicuously does not mean that they must be more conspicuous than other terms in a combined contract-disclosure statement, nor does it preclude the use of a multi-purpose disclosure form that enables the lessor to designate the specific disclosures applicable to a given transaction.

12 C.F.R. Pt. 213, Supp. I, §213.4(a)(1) cmt. 1, at 368 (1995) (emphasis added).

STATEMENT OF THE CASE

A. Introduction

This case concerns the disclosures that a lessor must make in an automobile lease under the Consumer Leasing Act

("CLA"), 15 U.S.C. §§1667-1667f (1994 and Supp. V 1999), and the regulations promulgated under that statute. Respondent filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the early-termination clauses in NMAC's leases violated the disclosure requirements of the CLA and the Federal Reserve Board's Regulation M. The district court had jurisdiction pursuant to 28 U.S.C. §1331.

On cross motions for summary judgment, the district court held that NMAC's leases complied with the disclosure requirements of the CLA and Regulation M, and accordingly granted summary judgment for NMAC. App. 31a. The court of appeals reversed, holding that, to comply with the statute and regulations, NMAC was required to disclose a specific number used in calculating the early-termination charge under the lease. By ruling that the substantive content of CLA disclosures must be "reasonably understandable" to consumers, the court of appeals adopted a reading of the CLA and Regulation M that departs from the Federal Reserve Board's focus on the "manner" and "form" of the disclosures. The court of appeals' holding also conflicts with the Seventh Circuit's decision in a similar case, which held that the CLA's disclosure requirements govern "the mode of presentation, not the degree of comprehension."

B. Factual Background

In November 1994, respondent Leonard Applebaum executed a three-year lease (the "1994 Lease") for a 1995 Nissan Maxima with Reitenbaugh Enterprises, Inc., an automobile dealer in Pennsylvania. Reitenbaugh assigned the 1994 Lease to NMAC. App. 3a.

In January 1997, Applebaum terminated the 1994 lease, to trade in his old car for a 1997 Nissan under a new lease (the "1997 Lease"). Reitenbaugh informed Applebaum of the charges associated with the early termination of the

1994 Lease. App. 3a. Applebaum arranged to have the termination charges incorporated into the financed amount due under the 1997 Lease, which he proceeded to execute. *Id.* at 4a.

Both leases contained an early-termination provision that disclosed the method for determining the charge for early termination. The early-termination provision in the 1994 Lease provided:

> [I]f I terminate early, in addition to the above charges, I must pay you an Early Termination Charge which is determined as follows: First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

App. 3a.[1] Respondent claims that this language does not satisfy the disclosure requirements in the CLA and Regulation M. In particular, Applebaum claims that the early-termination provision violates the CLA's "clear and conspicuous manner" requirement because it uses the term "residual value" without defining the term or disclosing the amount of "residual value" assigned to the vehicle that Applebaum leased.

C. Statutory and Regulatory Background

The CLA and its implementing regulations (Regulation M) require lessors to make certain disclosures regarding the terms of commercial leases. The CLA was passed in 1976 as an amendment to the Truth in Lending Act ("TILA"), 15

---

[1] The language of the early-termination provision in the 1997 Lease is substantially similar to that in the 1994 Lease. *Id.*

U.S.C. §§ 1601 *et seq.*, largely in response to an increase in the practice of automobile leasing.[2] Like the TILA, the purpose of the CLA is "to assure a meaningful disclosure" of personal property lease terms to "enable the lessee to compare more readily the various lease terms available to him . . . ." 15 U.S.C. §1601(b). To that end, the CLA requires the lessor to provide the lessee with a written statement that sets forth in "a clear and conspicuous manner" the key terms of the lease, including the circumstances under which either party will be permitted to terminate the lease early, and the "amount or method of determining any penalty or other charge for . . . early termination." 15 U.S.C. §1667a(11).

Congress granted the Federal Reserve Board "expansive authority" to promulgate regulations under the TILA and the CLA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980); 15 U.S.C. §§ 1604, 1667f; *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 381 (7th Cir. 1996). Regulation M, codified at 12 C.F.R. Part 213, implements the disclosure requirements established by the CLA. At the time the leases at issue in this case were executed, the Regulation M provision regarding early termination was virtually identical to that contained in the statute itself. *See* 12 C.F.R. §213.4(g)(12) (1995) (requiring disclosure of the "amount or method of determining the amount of any penalty or other charge for early termination"). According to Regulation M, this early-termination disclosure, like the other disclosures required by the CLA, was to be made "clearly, conspicuously, [and] in meaningful sequence . . . ." 12 C.F.R. §213.4(a)(1). Thus, Regulation M took the statutory phrase "in a clear and conspicuous manner" and added the gloss of requiring that the statutory disclosures be made "in meaningful sequence."

---

[2] A leading industry publication reported that 1.9 million automobile leases were entered in the United States in 1996. J. Henry, *Survey Finds Leasing Up Sharply in 1996*, Automotive News, June 23, 1997, at 16.

The Federal Reserve Board also published an Official Staff Commentary to the Board's Regulation M. Explicating the phrase "clearly, conspicuously and in meaningful sequence," the Commentary stated that the required disclosures must be "in a reasonably understandable form." Elaborating further, the Commentary explained that, "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, Supp. I, §213.4(a)(1) cmt. 1, at 368 (1995). Thus, the Commentary, through its use of the phrase "in a reasonably understandable form," continued the statutory and regulatory focus on the "manner" or the "form" in which the required disclosures were made.

Several courts construing these disclosure provisions, including the courts below, have recognized that early-termination provisions often involve complex mathematical calculations that are beyond the understanding of the average consumer. The courts have held that the CLA and Regulation M do *not* require that the lease disclosures enable the average consumer to understand or perform the calculation described in the early-termination clause. App. 11a, 28a; *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d at 382. *But see Lundquist v. Security Pacific Automotive Financial Servs.*, 993 F.2d 11, 15 (2d Cir.) (holding that the early-termination disclosures in an automobile lease violated the CLA because they were "confusing, unduly complicated, and unnecessarily convoluted" and "beyond the understanding of the average consumer"), *cert. denied*, 510 U.S. 959 (1993).

"Residual value," one of the terms used in the early-termination provision of the leases at issue here, is a term with established meaning in the leasing field. App. 15a. It has recently been defined as "[t]he end-of-term value of the vehicle established at the beginning of the lease and used in calculating your base monthly payment." *Id.* (quoting Federal Reserve Board's web page). Before 1996, neither the CLA

nor Regulation M expressly defined the term "residual value" or required that the term be defined or its amount disclosed in an automobile lease. App. 28a. In 1996, the Federal Reserve Board revised Regulation M to define "residual value" and to require a lessor to disclose the amount of the residual value when that quantity is used in calculating a payment under the lease. 12 C.F.R. §213.4(f)(4) (1998). The revised version of Regulation M defines "residual value" to mean "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment." 12 C.F.R. §213.2(n) (1998). Although these amendments became effective on October 31, 1996, compliance was not mandatory until January 1, 1998, and they do not govern the leases at issue in this case. 62 Fed. Reg. 51,006 (1997); 61 Fed. Reg. 52,246 (1996).

Prior to the 1996 amendments, Regulation M specifically required disclosure of the residual value in an open-end lease, 12 C.F.R. §213.4(g)(15) (1995), but it contained no such requirement for a closed-end lease, such as the leases at issue here.[3] *See* 61 Fed. Reg. 52,246, 52,251 (1996). By promulgating a regulation requiring disclosure of the residual value in certain circumstances, the Federal Reserve Board demonstrated its awareness that the term "residual value" was being used in automobile leases, but the Board stopped short of requiring disclosure of the residual value amount in circumstances like those presented here.

There is a further relevant aspect of the regulatory scheme. Under 15 U.S.C. §1604(b)—and, since 1996, under 15 U.S.C. §1667f(b) as well—Congress directed the Federal Reserve

---

[3] An open-end lease is one in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value. *See* 12 C.F.R. §213.2(i) (1998). In a closed-end lease, by contrast, the consumer is not liable for the difference between the residual and the realized value at the end of the lease term. 61 Fed. Reg. 52,246 (1996).

Board to "publish model disclosure forms and clauses for common transactions to facilitate compliance" with the statutory disclosure requirements. Section 1604(b) provides that a lessor that properly uses the model form published by the Board "shall be deemed to be in compliance" with the statutory disclosure requirements.[4] *See Turner v. General Motors Acceptance Corp.*, 180 F.3d 451, 458 (2d Cir. 1999) ("proper use of the model forms published by the FRB represents *per se* compliance with the regulation").

As relevant here, the applicable model form at the time of the leases at issue contained only a single line: "The charge for such early termination is _____." 12 C.F.R. Pt. 213, App. C, Form C-2, at 357 (1995). The form said nothing about residual value, and it did not include any line item or other space in which the amount of the residual value was to be placed. By contrast, after the 1996 amendments to Regulation M, the Board adopted a revised model form that explicitly calls for the disclosure of the dollar amount of the residual value. *See* 12 C.F.R. Pt. 213, App. A, Form A-2, at 367 (1998).

D. Proceedings in the District Court

After executing the 1997 Lease, Applebaum filed this action against NMAC and Reitenbaugh, alleging that the early-termination provision of the leases violated the CLA (1) because it used terms such as "constant yield method" and the

---

[4] The relevant sentence of Section 1604(b) states:

> A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor (1) uses any appropriate model form or clause as published by the Board, or (2) uses any such model form or clause and changes it by (A) deleting any information which is not required by this subchapter, or (B) rearranging the format, if in making such deletion or rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

"rate implicit in the lease" without further explanation, and (2) because it failed to define or disclose the amount of the leased vehicle's "residual value." The district court granted summary judgment for defendants, relying in part on the Seventh Circuit's opinion in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379 (7th Cir. 1996). After reviewing the statutory language at issue, as well as the language of Regulation M and the 1994 Official Staff Commentary, the district court concluded that the CLA and Regulation M require "clarity and full presentation of terms, not full presentation of the details or formulation of a mathematical equation." App. 24a. The court rejected respondent's argument that the CLA disclosures must be within the comprehension of the average consumer, explaining that, to comply with the statute and regulation, the disclosures need only be "visible to the lessee and in a readable format"; they need not be "simple enough to do the mathematical calculations of the exact amount." *Id.* The court emphasized that "[t]he CLA does not require the lessor to explain complex mathematics in the lease; stating the method used satisfies the disclosure requirement." *Id.* at 28a.

Applying these principles to the early-termination provision in the NMAC leases, the court found that the leases complied with the statute and regulation. The court explained that the "lease provision states each step in the calculation of the early termination charge," allowing a lessee to determine the formula or method by which the charge would be calculated. App. 27a. Although the average consumer may not understand the meaning of terms such as "constant yield method," the court found that the method was "well known in the industry," and the court therefore ruled that the CLA required no more than that the lessor identify it by name. *Id.*

The court also held that the lessor was not required to define the term "residual value" as used in the early-termination provision, noting that, at the time the leases were executed, Regulation M specifically required a definition of

"residual value" only in an open-end lease, and not in a closed-end lease such as the leases involved in this case. App. 28a (citing 12 C.F.R. §213.4(g)(15) (1995)). Relying on this Court's statement in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980), that "caution must temper judicial creativity in the face of legislative or regulatory silence," the district court declined to read into the CLA and Regulation M a requirement that "residual value," a concept familiar to the Federal Reserve Board, be defined in early-termination provisions in leases other than those in which the Board explicitly required such disclosure. App. 28a, 29a.

E. The Court of Appeals' Decision

The court of appeals reversed the district court's grant of summary judgment, and remanded with instructions to enter judgment for Applebaum. The court agreed that the leases' failure to define the terms "constant yield method" and "rate implicit in the lease" did not violate the CLA's disclosure requirements. The court ruled, however, that NMAC was obliged to disclose, in the early-termination provision of the lease, the amount of residual value that had been assigned to Applebaum's car. App. 15a. The court so held despite its recognition that (1) the CLA and Regulation M do not require lease terms to be within the comprehension of the average consumer, *id.* at 11a; (2) "[r]esidual value, like the constant yield method, is a term with an established meaning in the leasing field," *id.* at 15a; and (3) neither the CLA nor Regulation M specifically required a definition or description of the term "residual value," *id.* at 12a. Notwithstanding these facts, the court ruled that the leases violated the CLA because the early-termination clause, by failing to tie a specific number to the term "residual value," was not "'reasonably understandable' in any meaningful sense of the term." *Id.* at 15a.

The words "reasonably understandable" do not appear in the statute or in Regulation M. The words do appear in the

Official Staff Commentary to Regulation M, but only as part of a longer phrase, which the Commentary derives from the statutory "clear and conspicuous manner" standard, and from Regulation M's resulting requirement that disclosures be made "clearly, conspicuously, and in meaningful sequence." According to the Commentary, this statutory and regulatory language means that the CLA disclosures must be made "in a reasonably understandable form." The Commentary thus does not use the words "reasonably understandable" in a vacuum but rather as a modifier of the word "form." Taken in context, the Commentary's statement does not impose any new substantive disclosure requirement but rather merely restates in different words the statutory and regulatory focus on the "manner" in which the required disclosures are made. The Commentary's reference to the "form" of the CLA disclosures is consistent with the Seventh Circuit's ruling in *Channell* that the CLA's "clear and conspicuous manner" requirement "refers to the mode of presentation" and means "visible, not simple." 89 F.3d at 382. Here, however, the court of appeals rejected *Channell*'s interpretation, holding that "disclosure of the method of calculating an early termination penalty must not only be legible, it must also be 'reasonably understandable'." App. 11a.

The court treated the Federal Reserve Board's decision specifically to require disclosure of the residual value in open-end leases but not in closed-end leases as insignificant. The court identified what it regarded as a "critical difference" between open-end and closed-end leases, and it said that this difference removed any significance from the Board's different regulatory requirements for the two kinds of leases. App. 16a-17a. In an open-end lease, the court explained, the lessee's liability at the end of the lease is based upon the difference between the residual value of the leased property and its realized value, and thus "residual value is always relevant to a lessee's liability in an open-end lease . . . ." *Id.* By contrast, the court said, closed-end leases sometimes do

not use the residual value concept at all. The court concluded, therefore, that "the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary to make a closed-end lease reasonably understandable if it uses that term." *Id.* at 17a. Turning to the NMAC leases at issue, the court held that, because the leases used the concept of residual value as a component in calculating the early-termination charge, the lessor was required to disclose the amount of that value. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents important issues regarding the disclosures that a lessor must make in an automobile lease under the CLA and Regulation M, and the extent to which those disclosures should be prescribed by federal courts rather than by Congress and by the Federal Reserve Board, the agency charged with the responsibility to implement this complex statutory and regulatory scheme. The court of appeals made a fundamental error in departing from and augmenting the CLA's focus on the "manner" of disclosure, in favor of imposing a new substantive requirement—the amount of a vehicle's residual value—of the court's own devising. The court adopted this new requirement even though it was not contained in the Board's own model form for compliance with the CLA. Concentrating not on the language of the statute or Regulation M, the court emphasized instead the Official Staff Commentary, and it then subtly but significantly altered even the Commentary's language, asking not whether the CLA disclosures were "in a reasonably understandable form," but whether they were "reasonably understandable." The court thus substituted its judgment for that of the Federal Reserve Board, and it did so in a manner that is directly at odds with the Seventh Circuit's approach in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379 (7th Cir. 1996).

Although the Regulation M amendments, as of January 1, 1998, require disclosure of the residual value amount in closed-end leases when that amount is used in calculating periodic payments under the lease, the court of appeals' decision remains enormously significant, both for existing leases and prospectively. In the first place, there are hundreds of thousands of leases that remain in effect or that are the subject of pending litigation that will be affected directly by the court of appeals' ruling.[5] More important, the court's decision will increase substantially the cost and uncertainty of complying with the CLA and Regulation M in the future. Even in circumstances like those presented here, where the Federal Reserve Board has explicitly required a certain disclosure in some situations but not in others, lessors subject to the statute will not be able to conclude with any confidence that the disclosure is required only when the Board says it is. Instead, they will need to attempt to predict when a reviewing court might conclude, notwithstanding the Board's detailed and comprehensive regulations, that a disclosure is required even in circumstances not identified by the Board.

This process can be expected to increase expenses for both lessors and consumers, and to do so with only the most negligible of corresponding gains in the amount of useful information provided to lessees. Here, for example, even if the precise amount of the residual value of Applebaum's vehicle had been disclosed, Applebaum still would have been unable himself to calculate his early-termination charge, as

---

[5] Several new lawsuits have been filed as a consequence of the court of appeals' decision in this case. They include a purported class action in state court in Florida (*LaFramboise v. NMAC*, No. 00-007609 (Orange County Cir. Ct. filed Oct. 17, 2000) (allegedly involving more than 200,000 leases)) and federal cases in Georgia and New Jersey. *See Carmichael v. NMAC*, No. 1:00:CV-1254-TWT) (N.D. Ga. filed May 19, 2000); *Backensto v. NMAC*, No. 00CV-6203 (SMO) (D.N.J. filed Dec. 21, 2000).

the court of appeals seemingly acknowledged. App. 15a. The court of appeals' decision thus interferes with the Federal Reserve Board's regulatory scheme and undermines the ability of regulated entities to rely on the Board's expertise, and it does so without any meaningful countervailing advance in the purposes that the CLA was intended to serve.

Review should be granted to resolve the conflict among the circuits regarding the nature of the CLA's disclosure requirements, and to restore the ability of regulated entities to confidently prepare their lease disclosures in reliance on the regulatory regime in effect at the time of the leases.

A. The Third Circuit's Interpretation of the "Clear and Conspicuous Manner" Standard of the CLA and Regulation M Conflicts Directly with the Seventh Circuit's Decision in *Channell*

The Third Circuit's holding in this case that, in order to satisfy the "clear and conspicuous manner" standard in the CLA and Regulation M, the language must be not only legible, but also "reasonably understandable," cannot be reconciled with the Seventh Circuit's decision in *Channell*, 89 F.3d 379 (1996). *Channell* addressed the question whether an early-termination clause that uses the term "sum-of-the-digits method" must explain what that method entails in order to satisfy the CLA's requirement that disclosures be made "in a clear and conspicuous manner." The court sustained the district court's ruling that "only the method, and not the way the method works, needs to be disclosed," and observed that "[i]t is hard to read the statute and regulation any other way."[6] *Id.* at 382. Although neither the CLA nor Regulation M defines "clear and conspicuous," the *Channell*

---

[6] The Official Staff Commentary to Regulation M now expressly permits the lessor to refer to "a generally accepted method," like the "constant yield method." 12 C.F.R. Pt. 213, Supp. I § 213.4(g) cmt. 2, at 377 (1998).

court found that the terms are "staples" of commercial law, and that " '[c]lear and conspicuous manner' . . . means visible, not simple. 'Manner' refers to the mode of presentation, not the degree of comprehension." *Id.* The court thus rejected the plaintiff's argument that an early-termination provision must be understandable to the average consumer in order to satisfy the CLA and Regulation M.

The court of appeals in this case disagreed with *Channell*'s conclusion that the statutory phrase "in a clear and conspicuous manner" deals only with the presentation of the disclosure, as opposed to its meaning. Although the court concluded, relying on dictionary definitions, that the term "conspicuous" is unambiguous, and requires, as *Channell* held, that the disclosure be "obvious to the eye" or "plainly visible," the court also ruled that the term "clear" can mean a number of things, including "easily visible or distinguishable," "without misconception, error, or vagueness," or "easily understood." App. 10a. In light of what the court considered to be ambiguity in the statutory language, the court consulted the Official Staff Commentary, which states that the CLA disclosures must be "in a reasonably understandable form." 12 C.F.R. Pt. 213, Supp. I, § 213.4(a)(1) cmt. 1, at 368 (1995).

The court did not explain why it believed that the Commentary's phrase "in a reasonably understandable form" resolved the perceived ambiguity in the statutory phrase "in a clear and conspicuous manner." Nor did the court explain how the Commentary's use of a phrase referring to the "form" of disclosures (as compared to the statutory language referring to the "manner" in which disclosures are made) implicated the substantive meaning of the disclosures rather than their mode of presentation. *See Channell*, 89 F.3d at 382. Instead, the court simply declared that the Commentary "adopts an interpretation that refers to the characteristics of the language used in making the disclosures." App. 10a. In the remainder of its opinion, the court discontinued references

to the "form" or "manner" of disclosure, and judged the disputed lease provision under the court's own "reasonably understandable" standard.

In a recent decision, the Seventh Circuit acknowledged, citing the court of appeals' decision in this case, that "the word 'clear' could mean 'easily understood' or some variant." *Jordan v. Toyota Credit Corporation*, 236 F.3d 866, 867 (7th Cir. 2001). The court refused, however, "to depart from the conclusion of *Channell* that how far to go in the direction of requiring complex concepts to be presented in easy-to-follow language (if that is possible at all) is a question for the Federal Reserve."[7] *Id.* The court of appeals in this case, by contrast, displayed no such restraint. Rather, having worked its way from the statute to Regulation M to the Staff Commentary to its own modified version of that Commentary, the court announced the following rule: "disclosure must be cast in a form that is reasonably understandable in light of the difficulty of the matter being disclosed. The benchmark is the nature of the matter discussed."[8] App. 11a n.6.

Applying its newly devised formula to the early-termination clause at issue, the court of appeals ruled that the

---

[7] The *Jordan* court's statement that it "follow[ed] *Applebaum*" did not concern the Third Circuit's discussion of the interplay between the statutory phrase "in a clear and conspicuous manner" and the Commentary's phrase "in a reasonably understandable form." *See* 236 F.3d at 867. Rather, the statement in *Jordan* was clearly directed at the Third Circuit's other holding, which *Jordan* followed, that use of the term "constant yield method" is adequate under Regulation M.

[8] Even as it announced its new and more demanding disclosure standard, the court of appeals nevertheless declined to go so far as to align itself with the holding in *Lundquist v. Security Pacific Automotive Financial Servs.*, 993 F.2d 11, 15 (2d Cir. 1993), which required CLA disclosures to be within "the understanding of the average consumer." Instead, the court apparently attempted to devise its own middle ground somewhere between *Channell* and *Lundquist*.

term "residual value" was not "reasonably understandable" despite the fact that it is "a term with an established meaning in the leasing field." App. 15a. The court explained that the residual value is a specific amount assigned to the vehicle by the lessor at the beginning of the lease and that, because the lessor can use varying criteria in setting the residual value, the precise amount of that value cannot be known unless it is disclosed. *Id.* The court ignored the fact that the CLA explicitly provides that any early-termination charge must be reasonable, 15 U.S.C. 1667b(b); that, because the NMAC leases use the residual value in computing the early-termination charge, the residual value itself must be set so as not to produce an unreasonable charge on early termination; and that respondent in this case did not even contend that the early-termination charge actually imposed under the 1994 Lease was unreasonable in violation of the CLA. The court also disregarded the applicable model form published by the Federal Reserve Board, which did not require disclosure of the residual value amount at the time of the leases in this case.

In tinkering with the Federal Reserve Board's regulatory system and adopting its own conclusion as to whether the amount of residual value should have been disclosed, the court of appeals erred in several important ways.

First, the court substituted its own judgment for that of the Board in requiring a specific disclosure that neither the CLA itself nor Regulation M required. Notwithstanding the detailed and comprehensive character of the Board's regulations, and notwithstanding the fact that the relevant regulations required a residual value disclosure only in the case of open-end leases, the court took it upon itself to impose a similar requirement for the closed-end leases at issue here. By doing so, the court not only readjusted the carefully wrought regulatory balance between leasing companies and consumers but also deprived NMAC and other

lessors of the ability to prepare their lease disclosures in reliance on the items prescribed in the Board's regulations.

It is no answer to say that, some time later, when the Federal Reserve Board amended Regulation M in 1996, it chose to require further disclosures regarding residual value in closed-end leases. *See* 12 C.F.R. §213.4(f)(4) (1998). That is how changes in the Board's comprehensive regulatory regime are supposed to occur. After revisiting many features of the required CLA disclosures, and considering comments from both industry and consumer groups, the Board made extensive revisions to Regulation M and, in the course of doing so, explicitly defined "residual value," required disclosures regarding the significance of the residual value in calculating a lessee's periodic payments, and altered the relevant model form to provide for disclosure of the residual value's amount. Such modification of the CLA's disclosure requirements should be effected by Congress or the Board, not by the *ad hoc* rulings of a single federal court.

Nor can the court of appeals' decision be justified by a desire to enable an individual lessee to compute his own early-termination charge. As the court itself recognized (App. 13a), due to the complexity of some of the mathematics involved, "the vast majority of lay persons" could not calculate the early-termination charge under the lease even if the precise residual value were stated. Under these circumstances, it is difficult to see the utility in departing from the *Channell* rule just so that a mathematician—but not a consumer—could calculate the early-termination charge. This is not what Congress or the Federal Reserve Board intended by the phrase "in a clear and conspicuous manner." Instead of giving "the consumer information that can be put to use" in comparing competing lease terms—which both *Channell* and the courts below recognized as the purpose of the CLA's disclosure provisions—the rule adopted by the court of appeals contributes to a kind of "information

overload" that does not advance the legislative objective of the CLA.

Moreover, the court of appeals' rule likely will prove unworkable. *Channell* establishes a bright-line test under which lessors and lessees, as well as the Board and the courts, can discern whether a required disclosure is "in a reasonably understandable form." Under *Channell*, the question is whether the disclosure is visible, and "so written that a reasonable person against whom it is to operate ought to have noticed it." 89 F.3d at 382 (internal quotes omitted). By contrast, the test devised by the court below—*i.e.*, reasonably understandable in light of the difficulty of the matter being disclosed—can only be applied by a person familiar with the automobile leasing industry or by a court operating with the benefit of 20/20 hindsight. This small group is a far cry from the CLA's target audience. *See* App. 6a (noting that the purpose of the CLA was "to provide consumers with meaningful information") (quoting S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432); *see also Smith v. Cash Store Management, Inc.*, 195 F.3d 325, 327-28 (7th Cir. 1999) (sufficiency of TILA disclosures to be determined "from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.") (quoting *Cemail v. Viking Dodge*, 982 F. Supp. 1296, 1302 (N.D. Ill. 1997)).

By its nature, the rule adopted by the court of appeals can be implemented only on a case-by-case basis after the fact. In the meantime, lessors will be left in the dark as to whether a particular disclosure passes muster. This would hardly advance the "decided [congressional] preference" evident in the language and legislative history of the CLA, and recognized by this Court in *Ford Motor Credit Co.*, "for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." 444 U.S. at 568.

Finally, the mischief caused by the court of appeals' decision will not be limited to the CLA. The "clear and conspicuous" standard is replicated in several other sets of regulations promulgated by the Federal Reserve Board. *E.g.*, 12 C.F.R. §229.15(a) (Regulation CC, implementing the Expedited Funds Availability Act); 12 C.F.R. §230.3(a) (Regulation DD, implementing the Truth in Savings Act of 1991); 12 C.F.R. §226.17(a)(1) (Regulation Z, implementing the Truth in Lending Act). If left unresolved, the current circuit split regarding the proper interpretation of this language will cast doubt upon the legality of disclosures made under all of these regulations.

B. The Court of Appeals' Decision in This Case Conflicts with this Court's Admonition in *Ford Motor Credit Co. v. Milhollin* Against Judicial Activism in the Face of Regulatory Silence.

In holding that NMAC was required to disclose or define "residual value" in the Applebaum leases, the court of appeals improperly read additional disclosure requirements into the CLA and Regulation M despite the Federal Reserve Board's decision to require such disclosure only in open-end leases. This is precisely the sort of judicial creativity that was criticized by this Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In that case, which involved the interpretation of the disclosure provisions of the TILA, 15 U.S.C. §§ 1601 *et seq.*, the Court stated:

> [L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

444 U.S. at 565. The Court thus directed judges "to refrain from substituting their own interstitial lawmaking for that of

the Federal Reserve, so long as the latter's lawmaking is not irrational." *Id.* at 568. This principle has guided decisions of this Court and lower courts on numerous occasions since.[9]

Here, the Federal Reserve Board's regulations required disclosure of residual value in open-end leases but not in closed-end leases. *See* 12 C.F.R. §213.4(g)(15) (1995); 61 Fed. Reg. 52,246, 52,251 (1996). Nonetheless, the court of appeals felt free to impose its own requirement that residual value be defined or disclosed in the Applebaum leases, not because any regulation specifically required such disclosure, but because, in the judgment of the court of appeals, such disclosure was necessary to make the early-termination provision "reasonably understandable"—a standard that does not appear in either the statute or Regulation M. The court

---

[9] *See, e.g., O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 85 (1994) (refusing to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed"); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982) ("When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant."); *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 670 (D.C. Cir. 1986) (declining to recognize competitor's right of participation in administrative proceedings under the Wrecked Vessels Statute in the face of both statutory and regulatory silence on the issue); *Ritter v. Durand Chevrolet, Inc.*, 945 F. Supp. 381, 384 (D. Mass. 1996) (holding that neither TILA nor Regulation Z required lender to conduct actuarial analysis of allocation of third-party insurance company's premium in order to allow the consumer to verify compliance with disclosure requirements); *Gaydos v. Huntington Nat'l Bank*, 941 F. Supp. 669, 677 (N.D. Ohio 1996) (refusing to require lessor to disclose its practice of earning profit on security deposit where CLA and Federal Reserve's regulations required no such disclosure); *In re Thebeau*, 3 B.R. 537, 538 (E.D. Ark. 1980) (relying on *Ford Motor Credit Co.* in refusing to read bankruptcy code's "good faith" provision as requiring plan to propose payment of creditors, explaining that "[c]aution tempers this Court not to create payment requirements to creditors when Congress has already said what payments are required.").

dismissed as insignificant the fact that the Federal Reserve Board knew how to require disclosure of residual value when it saw fit, and had in fact required lessors to make such disclosure in open-end leases. Instead, the court chose to consider, not whether this decision was irrational, as this Court instructed, *see* 444 U.S. at 568, but whether the court could imagine some reason why the Federal Reserve Board might have overlooked the need for a comparable requirement in closed-end leases. Concluding that "a critical difference" between open- and closed-end leases could explain the Federal Reserve's silence—*i.e.*, that open-end leases by definition rely on the concept of "residual value" to determine the lessee's liability at the end of the lease, whereas "lessors need not, and often do not, use the concept of residual value [to determine early-termination charges] in closed-end leases"—the court of appeals held that "the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary . . . ." App. 17a.

The court's willingness to interpose its own regulatory requirement thus depended on its own after-the-fact assessment of whether the Board made a "considered decision." This is just the sort of "judicial creativity" and regulatory gap-filling that *Ford Motor* counsels against. If the court of appeals' decision is permitted to stand, it will open the door to increased judicial embellishment of complex regulatory schemes whenever the agency charged with implementing a statute decides not to impose a particular requirement that a court later deems desirable. In the face of regulatory silence, courts will impose their own regulations whenever they can conjure up a reason for thinking that the agency's silence may not have been the product of a "considered decision" not to regulate. If the decision below is any indication, courts routinely will find such a reason unless the agency explicitly has declared its intention to leave an area unregulated. *See*

App. 14a (rate implicit in lease need not be disclosed under 12 C.F.R. §213.4(g)(12) (1995), since "the Board has declined to impose an obligation that lessors disclose the lease rate after giving the question considerable thought and attention") (citing Federal Reserve Final Rule, 61 Fed. Reg. 52,246, 52,254-55). Requiring an agency in every instance in which it deems a potential regulation unnecessary to explain that its failure to regulate was intentional will put an unreasonable burden on agencies to anticipate future litigation and to enumerate in advance all of the conceivable regulatory steps that it has deliberately decided not to take.

The Court should grant review in this case to prevent the erosion of agency autonomy and to re-emphasize the need for judicial deference to administrative agencies operating within their areas of expertise. Under *Ford Motor*, the Federal Reserve Board's decision to require disclosure of residual value in open-end leases but not in closed-end leases was entitled to such deference, and the court of appeals should have abstained, as the district court did, from substituting its own judgment for that of the agency. Unless the court had some basis for finding the Federal Reserve's decision irrational—which it did not—"[f]aced with an apparent lacuna in the express prescriptions of [the CLA and Regulation M,] the Court of Appeals had no ground for displacing the Federal Reserve staff's expert judgment." 444 U.S. at 570.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JILL E. JACHERA
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6608

Counsel for Petitioner

PETER BUSCEMI
Counsel of Record
A. C. BROOKE CLAGETT
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

March 23, 2001